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Supreme Court of the United States

OCTOBER TERM, 1962

No. 500

THE SCHOOL BOARD OF THE CITY OF CHARLOTTESVILLE, VIRGINIA
AND
FENDALL R. ELLIS, DIVISION SUPERINTENDENT, CITY OF CHARLOTTESVILLE, VIRGINIA,
Petitioners

v.

DORIS DILLARD, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Date: October 9, 1962

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I.

INTRODUCTION

The School Board of the City of Charlottesville, Virginia and Fendall R. Ellis, Division Superintendent of Schools, hereby petition that a writ of certiorari issue to review a judgment entered by the United States Court of Appeals for the Fourth Circuit on September 17, 1962 (Appendix C). That judgment reversed that part of an Order entered by the United States District Court for the Western

District of Virginia on December 18, 1961, which related to the assignment of pupils to the elementary schools of the City of Charlottesville, Virginia.

The only issues Petitioners seek to have reviewed are those related to the method of assigning pupils to the elementary schools. There are no longer any disputed issues related to the assignment of pupils to the high schools of the city.

II.

OPINIONS BELOW

The opinion of the District Court (Appendix A) is reported at 203 F. Supp. 225. The opinion of the Court of Appeals, with the two dissenting opinions (Appendix B) was filed on September 17, 1962 and is not yet in print.

The Order entered by the United States Court of Appeals for the Fourth Circuit on September 26, 1962 (Appendix D) recalled the mandate from the District Court and granted Petitioners a stay, provided they filed their petition for a writ of certiorari by October 10, 1962. By this Order all five judges of the Court of Appeals suggested that the issues here involved "merit review, especially".

III.

JURISDICTION

The opinion of the Court of Appeals, the two dissenting opinions and the judgment of the Court of Appeals are all dated September 17, 1962. It is thought that the judgment was also entered on that date. No petition for rehearing has been or will be filed.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

IV.

QUESTION PRESENTED

Must Petitions, who are charged with the administration of public schools in the City of Charlottesville, Virginia, be required, under the Fourteenth Amendment and decisions of this Court, to act favorably upon any and all requests of Negro children to transfer from school "A", which serves the zone of their residences, to some other school, solely because Petitioners, in administering a court approved desegregation plan which permits them to transfer pupils from one fixed geographical attendance zone to another when it is in the best academic interests of such pupils, have followed the practice of allowing transfers upon requests from certain white pupils living in the zone served by school "A", which is now occupied entirely by Negro pupils, and of allowing transfers upon requests from certain Negro pupils living in zones served by schools occupied entirely or predominantly by white pupils?

V.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves construction of the Fourteenth Amendment of the United State Constitution and the application of decisions of this Court prohibiting the administration of public schools on a racially segregated basis.

VI.

STATEMENT OF THE CASE

On February 18, 1959, the School Board of the City of Charlottesville adopted and put into effect its Public School Desegregation Plan (Appendix E). This plan was soon

thereafter approved by the United States District Court for the Western District of Virginia and it explicitly stated that "no pupil shall be denied admission to any public school of this city on the ground of race or color * * *".

The plan came under attack for the first time in August, 1960 and the District Court held that it provided a lawful way for assigning all pupils to the public schools of the city and that it was being administered by Petitioners in "good faith" and on a racially non-discriminatory basis. On appeal the United States Court of Appeals for the Fourth Circuit held that "the desegregation plan on its face is not objectionable on constitutional grounds since it provides a reasonable procedure without consideration of race or color by which school assignments are to be regulated". The Court, however, criticized certain ways in which the plan was being administered but did not reverse the District Court. See *Dodson v. School Board of the City of Charlottesville*, 289 F. 2d 439 (4th Cir., 1961). Thereafter Petitioners changed their method of administering the plan in an effort to satisfy the criticism of the Court of Appeals.

The sole question now to be considered relates to the method of assigning pupils to the elementary schools and of transferring them from one such school to another.

Under the desegregation plan the city was divided into six geographical zones of nearly equal size. In each zone is located an elementary school and every child, white or Negro, attending an elementary school is assigned initially to the school located in and serving the zone in which his residence is located.

Prior to September 1959 when racial segregation in these schools was brought to an end, the Jefferson Elementary School was occupied solely by Negro pupils and the other five elementary schools were occupied solely by white pupils. Under the desegregation plan, various Negro pupils were

admitted to a previously "all-white" elementary school and a previously "all-white" high school for the first time in September 1959. Since then a number of additional Negro pupils have been assigned to those two schools. It is admitted that as long as the previously "all-white" high school is not enrolled beyond its physical capacity, any Negro child in the city desiring to attend it may do so, regardless of place of residence or academic ability.

Although all children, white and Negro, are initially assigned to the elementary school located in and serving the zone of residence, under the desegregation plan the Superintendent may transfer any pupil to a school outside the zone of his residence "when the pupil and his parent or guardian indicate such a preference, provided that the Superintendent finds that such assignment would be consistent with the best academic interests of the pupil" and not cause the school to which the assignment is made to become burdened with an enrollment beyond its proper capacity. Relying upon this provision of the plan, the Superintendent acted favorably upon requests for transfer filed with him by a number of white pupils living in the Jefferson School Zone and assigned initially to that school because of residence. The Negro complainants in this case likewise live in the Jefferson School Zone and their requests for transfer were denied because the Superintendent found no academic advantage in their attending a school other than Jefferson, the school serving the zone of their residence. He did act favorably upon the request for transfer of one Negro child living in the zone because he considered the transfer to be to the academic interest of that child. Under the desegregation plan the Superintendent has the authority to do this and presumably he will allow the transfer of other Negro children from the Jefferson School Zone when such action will further the academic interests of the children involved.

Under the plan all Negro children living in any of the other five zones are initially assigned to the schools located in those zones. Prior to September 1959 these schools were occupied only by white pupils. A number of the Negro children living in those zones have requested transfers to the Jefferson School and the Superintendent has acted favorably upon all such requests. There is no evidence, or inference to be drawn from the evidence in this case, that requests for transfers filed by these Negro pupils were prompted by pressure or persuasion on the part of the teachers or school authorities. Under the plan white children living in these school zones are assigned to schools serving the zone of residence. They are not granted transfers to some other school unless an academic advantage from such transfer can be shown. As far as is known, no white child has received favorable action on a request for transfer from one of these schools to another. Furthermore, the method of assigning on a geographical zone basis has spread the enrollment among the various elementary schools in nearly equal proportions relative to the physical capacities of the respective schools.

The Negro complainants here involved admit that they live in the geographical zone served by the Jefferson School. They cannot contend that it is less convenient to attend this school than some other school. In fact the great majority of them live much closer to Jefferson School than to any other elementary school. They do contend, and this is the sole issue in the case, that they, along with all other Negro children in the Jefferson School Zone, are being denied their constitutional rights in not being permitted to transfer to some school other than Jefferson *solely* because certain white children living in that zone have been allowed to transfer to some other school.

The District Court found that the assignment and trans-

fer procedures here described did not offend the Fourteenth Amendment or decisions of this Court and that such procedures represented a lawful and practical method of assigning all pupils to the elementary schools under Petitioners' jurisdiction.

The United States Court of Appeals for the Fourth Circuit, after calling for reargument before the full court, reversed the District Court by a three to two decision, with Judges Haynsworth and Bryan filing separate dissenting opinions.

VII.

REASONS FOR GRANTING THE WRIT

In this case the Circuit Court has decided an important question of constitutional law which has not been, but should be, settled by this Court; furthermore, its decision is in conflict with recent decisions in the United States Court of Appeals for the Sixth Circuit.

Expressing the issue here involved in the light most favorable to Respondents, it is that Petitioners have adopted a procedure of granting transfers to pupils who request them so that they will not be placed in a racial minority in an elementary school; and that by following such practice Petitioners are denying the constitutional rights of Respondents when they do not act favorably upon their requests for transfer from the school serving their zone of residence, especially since certain white children have been allowed to transfer from the school serving such zone in order that they may not be placed in a racial minority in that school. Although the Charlottesville desegregation plan does not provide for this procedure in specific detail, as many other assignment plans do, the Charlottesville plan does permit it.

This very procedure was provided for specifically in the Nashville, Tennessee plan and it was declared to be in accordance with constitutional requirements by the United States Court of Appeals for the Sixth Circuit in *Kelley* v. *Board of Education of Nashville, etc.*, 270 F. 2d 209 (6th Cir., 1959). This Court denied certiorari in that case. See also to the same effect *Goss* v. *Board of Education of the City of Knoxville, Tennessee, etc.*, 301 F. 2d 164 (6th Cir., 1962). Upon being confronted with the identical question, the United States Court of Appeals for the Fifth Circuit has taken an opposite view. In *Boson* v. *Rippy*, 285 F. 2d 43 (5th Cir., 1960) that Court held that the so-called "minority transfer rights" could not be squared with the equal protection of the laws provision of the Fourteenth Amendment. This Court denied certiorari in that case.

As recently as October 8, 1962, this court granted a writ of certiorari in *Goss* v. *Board of Education, etc., supra* (U. S. Supreme Court Docket No. 217), and in doing so seems to have confined the issue to the same question as here presented. It is therefore respectfully suggested that by granting the writ herein sought and then consolidating the two cases for argument, the single question, common to both of them, can be presented in a way most helpful to this court.

It is known that district courts in Virginia approving desegregation plans in the Cities of Roanoke, Lynchburg and Arlington and in the County of Warren, have approved provisions which will result in the same practices as are involved here. Cases involving these communities will await the outcome of this Petition. It is to be expected that there are numerous other communities throughout the country similarly affected.

The majority and dissenting opinions in the United States

Court of Appeals for the Fourth Circuit show that the question here involved is one upon which able and conscientious judges at that appellate level cannot agree. The two dissenting opinions express the merit of Petitioners' contentions. Moreover, all five judges of that Court, by their Order of September 26, 1962 (Appendix C) have respectfully suggested to this Court that the issue merits review especially.

There is no inclination on the part of Petitioners to postpone a change in their assignment procedures simply for the sake of delay. This is demonstrated by the filing of this Petition within fourteen days of the entry of the Order recalling the mandate and granting the stay. They do, however, respectfully urge that the question here presented is of great importance not only to them, but to other school authorities throughout the country and that it is now hopelessly confused by an almost equal division of authority among the courts that have considered it. For the sake of consistency and harmony in complying with the *Brown* cases and *Cooper* v. *Aaron*, 358 U. S. 1, 78 S. Ct. 1401, this Court should grant a writ of certiorari and settle with finality the question here raised.

Respectfully submitted,

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Date: October 9, 1962

CERTIFICATE OF SERVICE

I, Richard L. Williams, a member of the Bar of the United States Supreme Court, and of counsel for Petitioners, hereby certify that the attached Petition for a Writ of Certiorari was served on the Respondents by depositing in the United States Mail, with first class postage prepaid, copies thereof addressed to S. W. Tucker, Esquire, 214 East Clay Street, Richmond, Virginia, Henry L. Marsh, III, Esquire, 214 East Clay Street, Richmond, Virginia, James M. Nabrit, III, Esquire, 10 Columbus Circle, New York 19, N. Y., Jack Greenberg, Esquire, 10 Columbus Circle, New York 19, N. Y. and Otto L. Tucker, Esquire, 901 Princess Street, Alexandria, Virginia, their counsel of record, this 10th day of October, 1962.

RICHARD L. WILLIAMS